SENTUL RAYA SDN BHD A

v.

HARIRAM JAYARAM & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
HELILIAH MOHD YUSOF JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NOS: W-02-704-2002, W-02-378-2004,
W-02-421-2004, W-02-603-2004, W-02-1061-2004, C
W-02-1062-2004, W-02-1063-2004, W-02-1064-2004,
W-02-163-2005 & W-02-1368-2006]
30 APRIL 2008

LAND LAW: *Housing developers - Damages for late delivery, appeal against - Whether time of the essence - Whether s. 56(3) Contracts Act 1950 applicable requiring notice be given - Whether there was frustration of contract - Whether damages must be proved - Whether developer need only perform obligations within reasonable time by virtue of s. 47 Contracts Act 1950* D E

There were ten appeals (four of which were cross appeals) from the decision of the High Court that awarded damages to the respondents for late delivery of condominium units ('units') purchased by the respondents from the appellant housing developer (See High Court case *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796). The four cross appeals were in relation to the High Court's refusal to award the respondents therein compensation up to the date on which each of them had taken actual physical possession of their respective units. The appellant raised four grounds before the court. Firstly, the respondents failed to give notice under s. 56(3) of the Contracts Act 1950 ('CA'). The appellant argued that once the date for delivery of vacant possession had passed, time was at large and notice should be given if the respondents intended to make time of the essence once more. Secondly, the 1997 financial crisis rendered impossible the execution of the building work or the completion of the construction of the units in question. Thirdly, the respondents were under a duty to prove the damages. Lastly, in respect of liquidated and ascertained damages, the appellant need only perform its obligations within a reasonable time by virtue of s. 47 CA. F G H I

Held (dismissing the appeals and allowing the cross appeals) Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Section 56(3) CA deals with contracts generally. The contract in the present case was a special contract. It was prescribed and regulated by statute, *ie*, the Housing Development (Control and Licensing) Regulations 1989 ('Regulations'). While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Schedule H of the Regulations cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too terms imposing additional obligations on the purchaser may not be included in the statutory form of contract. It followed that the requirement of notice under s. 56(3) CA that was an additional obligation to the detriment of the purchaser could not be imposed on the respondents in light of the statutory scheme under the Housing Development (Control and Licensing) Act 1966 ('HDCLA'). That was evident in the language of cl. 22(2) of the sale and purchase agreement prescribed in Schedule H of the Regulations. On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date of completion passes. Put differently, the said clause excludes the operation of s. 56(3) CA. This is another reason for holding that s. 56(3) CA does not apply in cases falling under the HDCLA. (para 8)

(2) The case of *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* makes it clear that the proposition that additional remedies are not excluded by the HDCLA refer to the remedies available to a purchaser and not to a developer. The said case also supports the non-applicability of s. 56(3) CA to a contract in Schedule H of the Regulations. (paras 9 & 10)

(3) The 1997 financial crisis merely made it more onerous or more expensive for the appellant to perform its obligations. It did not render the contract radically different. Further, under r. 11(3) of the Regulations it was open for the appellant to make representations to the Controller of Housing "owing to special circumstances or hardship or necessity compliance with

any of the provisions in the contract of sale is impracticable or unnecessary". Regulation 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the HDCLA. (para 13)

(4) On whether the respondents were under a duty to prove the damages suffered, cl. 22(2) of the sale and purchase agreement stated that the damages were liquidated and calculated in accordance with the formula prescribed by the said clause. No further onus lies upon the respondents in the appeals herein. (para 14)

(5) Once the date for delivery of vacant possession passed, the appellant's liability to pay liquidated damages in accordance with the formula provided became immediate. No question of time being at large arose. Accordingly, s. 47 CA had no application to the present case. (para 16)

(6) The appellant gave each respondent notice that vacant possession was available. However, there was at the material time liquidated damages owing from the appellant to the relevant respondents. Those damages exceeded, in each case, the sum owing from the respondents to the appellant. The respondents were entitled to set off the sums owing to them against the sums owing by them. Accordingly, the notices relied upon by the appellant were clearly invalid because delivery of vacant possession in each case was predicated upon payment of a sum not due. The respondents in the cross appeals were therefore entitled to continue to claim liquidated damages until they took possession of their keys to their respective apartments. There was therefore merit in the cross appeals. (para 17)

Bahasa Malaysia *Translation Of Headnotes*

Terdapat sepuluh rayuan (empat daripadanya rayuan balas) terhadap keputusan Mahkamah Tinggi yang mengawardkan gantirugi kepada responden-responden atas kelewatan penyerahan unit-unit kondominium ('unit-unit') yang dibeli oleh mereka dari pemaju perumahan, perayu (lihat kes Mahkamah Tinggi *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796). Empat rayuan balas tersebut adalah mengenai keengganan Mahkamah Tinggi mengawardkan pampasan kepada responden-responden sehingga ke tarikh sebenar penyerahan dibuat dan pengambilan

A milikan unit-unit. Di mahkamah, perayu membangkitkan empat alasan. Pertama, responden-responden gagal memberi notis di bawah s. 56(3) Akta Kontrak 1950 ('CA'). Kedua, krisis kewangan tahun 1997 menyebabkan pelaksanaan kerja-kerja pembinaan atau penyiapan unit-unit menjadi mustahil. Ketiga, responden-responden
B bertanggungan untuk membuktikan gantirugi. Akhir sekali, berhubung gantirugi jumlah tertentu dan berdasarkan s. 47 CA, perayu hanya perlu melaksanakan obligasinya dalam tempoh yang munasabah.

C **Diputuskan (menolak rayuan-rayuan dan membenarkan rayuan-rayuan balas)**
Oleh Gopal Sri Ram JCA menyampaikan penghakaiman mahkamah:

D **(1)** Seksyen 56(3) CA berurusan dengan kontrak secara amnya. Kontrak dalam kes semasa adalah satu kontrak khas. Ia ditetapkan dan dikawalselia oleh statut, iaitu, Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989 ('Peraturan'). Sementara pihak-pihak dalam sesuatu
E kontrak biasa bebas menentukan peruntukan-peruntukan yang dikehendaki, seorang pemaju perumahan tidak memiliki kebebasan tersebut. Oleh itu, pihak-pihak kepada satu kontrak di bawah Jadual H Peraturan tidak boleh keluar dari bentuk yang sudah ditetapkan itu. Terma-terma yang lebih
F membebankan pembeli tidak boleh diperuntukkan. Begitu juga terma-terma yang mengenakan obligasi tambahan ke atas pembeli tidak boleh dimasukkan di dalam kontrak statutori berkenaan. Ianya mengikut bahawa syarat memberi notis di bawah s. 56(3) CA yang merupakan obligasi tambahan yang
G memudaratkan pembeli tidak boleh dikenakan ke atas responden-responden berdasarkan skim statutori di bawah Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('HDCLA'). Ini terserlah dari perbahasan perenggan 22(2) perjanjian jual beli yang ditetapkan di Jadual H Peraturan. Atas pentafsirannya
H yang betul, perenggan ini menjadikan seseorang pemaju perumahan dengan serta merta bertanggungjawab untuk membayar gantirugi jumlah tertentu kepada pembeli sebaik sahaja tarikh siap berlalu. Dengan kata lain, perenggan tersebut telah menyingkir operasi s. 56(3) CA. Ini merupakan
I satu lagi sebab untuk merumuskan bahawa s. 56(3) CA tidak terpakai dalam kes-kes yang terangkum di bawah HDCLA.

(2) Kes *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* menunjukkan dengan jelas bahawa proposisi bahawa remedi tambahan tidak disingkir oleh HDCLA adalah merujuk kepada remedi-remedi yang terbuka kepada seorang pembeli dan bukannya kepada pemaju. Kes tersebut juga menyokong ketidak-terpakaian s. 56(3) CA kepada kontrak di dalam jadual H Peraturan.

(3) Krisis kewangan 1997 hanya membuatkan ianya lebih membebankan perayu atau lebih mahal baginya untuk melaksanakan obligasi-obligasinya. Ia tidak menyebabkan kontrak menjadi kontrak yang berbeza dengan secara radikal dari kontrak asal. Selain itu, di bawah per. 11(3) Peraturan ianya terbuka kepada perayu untuk membuat representasi kepada Pengawal Perumahan bahawa "berdasarkan halkeadaan istimewa atau kesusahan atau keperluan maka pematuhan kepada kontrak jualan adalah secara praktiknya mustahil atau tidak perlu". Peraturan 11(3) jelas telah menyingkir operasi doktrin kekecewaan berhubung kontrak yang dikawalselia oleh HDCLA.

(4) Berkaitan sama ada responden-responden bertanggungan untuk membuktikan kerugian yang dialami, perenggan 22(2) perjanjian jual beli menyatakan bahawa kerugian adalah berupa satu jumlah tertentu dan dikira menurut formula yang ditetapkan di dalam perenggan tersebut. Tiada beban lain dipikul oleh responden-responden di dalam rayuan-rayuan di sini.

(5) Sebaik tarikh penyerahan milikan kosong berlalu, tanggungan perayu untuk membayar gantirugi jumlah tertentu mengikut formula yang diperuntukkan berbangkit dengan serta merta. Soal masa sudah tidak lagi boleh diungkit. Seksyen 47 CA dengan itu tidak terpakai kepada kes di sini.

(6) Perayu memberi notis kepada setiap responden bahawa milikan kosong masih boleh diberi. Bagaimanapun, wujud gantirugi jumlah tertentu pada waktu material yang perlu dibayar oleh perayu kepada responden-responden terlibat. Gantirugi tersebut, dalam setiap kes, adalah melebihi jumlah yang dihutang oleh responden-responden kepada perayu. Oleh itu, responden-responden berhak untuk menolak jumlah yang mereka berhutang dengan jumlah hutang yang ditanggung oleh perayu. Ianya mengikut bahawa notis-notis yang menjadi

A pergantungan perayu adalah tidak sah, kerana penyerahan milikan kosong dalam setiap kes bergantung kepada pembayaran jumlah yang tidak terhutang. Maka responden-responden di dalam rayuan-rayuan balas berhak untuk terus menuntut gantirugi jumlah tertentu sehingga mereka memperolehi kunci-
B kunci apartmen mereka masing-masing. Rayuan-rayuan balas di sini adalah jelas bermerit.

Case(s) referred to:
City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69 ***(refd)***
C
Davies Contractors Ltd v. Fareham UDC [1956] AC 696 ***(refd)***
Ocean Tramp Tankers Corp v. V/O Savfracht [1964] 1 All ER 161 ***(refd)***
SEA Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(refd)***
Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363
D *FC* ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 47, 56(3)
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (3)
E

For the appellants - Tharminder Singh; M/s Loan Sabapathy & Co
For the respondent - Sree Harry; M/s Sree Harry & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-24-1213-2002]

F *Reported by Usha Thiagarajah*

JUDGMENT

G **Gopal Sri Ram JCA:**

[1] This is the judgment of the court.

[2] There are ten appeals before us today. They all give rise to common issues. In four of them there are cross appeals. We have
H heard a single argument from either side in all the appeals as well as the cross appeals. The relevant facts are as follows.

[3] The appellant is a housing developer. Its activities are controlled and regulated by the Housing Development (Control
I and Licensing) Act 1966 ("the Act") and the Regulations made thereunder. From about 1995 to about 1997 the appellant entered

into a number of agreements including those which are the subject matter of these appeals with members of the public to sell to them apartments in a condominium which the appellant had agreed to construct. Later, it transpired that the appellant was unable to make delivery of the apartments to the respondent in the ten appeals now before us. These respondents then brought actions to recover damages for delay of delivery of vacant possession of each of their apartments. In all these cases concerned, the High Court which heard the cases found for the respondents on the issue of liability. However in four of the suits the High Court refused to award the respondents compensation up to the date on which each of them had taken actual physical possession of their respective apartments. The four cross appeals are directed against the orders in these four cases.

[4] Before us, learned counsel for the appellant raised four grounds in support of the appeals. We will deal with each of them in turn. The first point is based on s. 56(3) of the Contracts Act 1950. For convenience we will set out the whole of s. 56. This is what it says:

> (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
>
> Effect of failure when time is not essential
>
> (2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.
>
> Effect of acceptance of performance at time other than that agreed upon
>
> (3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

[5] In order to appreciate learned counsel's submissions on the application of s. 56(3) it is necessary for us to deal with the relevant clauses in the statutory contract prescribed by the Regulation 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ("the Regulations"). They are cls. 22 and 24 of the sale and purchase agreement prescribed in Schedule H of the Regulations. They read as follows:

> Clause 22(2)
>
> If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the purchase price.
>
> Clause 24
>
> (1) The common facilities serving the said housing development shall be completed by the Vendor within thirty six (36) calendar months from the date of this Agreement.
>
> (2) If the Vendor fails to complete the common facilities in time the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten percentum (10%) per annum of the last twenty per centum (20%) of the purchase price.

[6] It is the appellant's case that time was at large once the date for it to deliver vacant possession had passed. If any of the respondents wish to make time of the essence once more it is incumbent upon each of them to give notice in that behalf under s. 56(3) of the Contracts Act 1950. In support of this argument learned counsel for the appellant referred us to a passage in the judgment of Lee Hun Hoe CJ (Borneo) in *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 where the learned Chief Justice said:

> The position is this: If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can

be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion. If this is done there would be a date from which liquidated damages could be calculated. In the present appeal, at no time did the respondent give notice to the appellant. Hence clauses 20 and 21 cannot be enforced.

[7] Learned counsel further submitted that his client entitled to rely on s. 56(3) notwithstanding the provisions of the Act and the Regulations. In support of this argument he relied on judgment of Lord Templeman in *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69 where he said that the Act and the subsidiary legislation made thereunder were designed to improve and supplement common law remedies and that they do not deprive a litigant of a contractual remedy not available under the Act or the Rules made thereunder.

[8] In our opinion there is no merit in the appellant's argument. So far as s. 56(3) of the Contracts Act 1950 is concerned, it deals with contracts generally. The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract. It follows that the requirement of notice under s. 56(3) which is an additional obligation to the detriment of the purchaser cannot be imposed on the respondents here in the light of the statutory scheme under the Act. This is evident in the language of cl. 22(2). On its proper construction, the clause makes a housing developer immediately liable to a purchaser in liquidated damages once the date for completion passes. Put differently, cl. 22(2) excludes the operation of s. 56(3). This is another reason for holding that s. 56(3) of the Contracts Act 1950 does not apply in cases falling under the Act.

[9] So far as the observation of Lord Templeman in *City Investment* is concerned, it has, in our view, been read out of context by the appellant. Here are the relevant passages in the advice which make the point clear enough:

A The appellants argue that the Act of 1966 does not apply where land is sold and is then developed. This argument makes nonsense of an Act which is clearly designed to protect purchasers from developers, and those purchasers need protection whether the sites of houses are sold before or contemporaneously with or after completion of the houses.

B

…

The judge also awarded damages for the difference between the construction price and the cost to the co-operative society of employing another builder to carry out the development at the date of the trial of the action. The appellants submit that the co-operative society is not entitled under the Rules to damages for the increased cost of building. But the Act of 1966 and the Rules were designed to improve and supplement common law remedies and do not expressly or by implication deprive a litigant of a contractual remedy which is not dealt with under the Rules.

[10] The above quoted passages make it clear that the proposition that additional remedies are not excluded by the Act refer to the remedies available to a purchaser and not to a developer. These passages also support the view that we earlier expressed on the non-applicability of s. 56(3) to a contract in Form H.

[11] That brings us to the second ground advanced in support of these appeals. It has to do with the doctrine of frustration. It is the appellant's case that the financial crisis of 1997 rendered impossible execution of the building work or the completion of the construction of the apartments in question. Since the performance of the contract became commercially impossible, the appellant should be excused from further performance of it and the contracts discharged. So goes the argument.

[12] The test for frustration which has been consistently applied by our courts is that laid down by Lord Radcliffe in *Davies Contractors Ltd v. Fareham UDC* [1956] AC 696, 729. The principle is that a contract is frustrated when an event occurs which renders performance of the contract "a thing radically different from that which was undertaken by the contract." Lord Denning MR in *Ocean Tramp Tankers Corp v. V/O Savfracht* [1964] 1 All ER 161 at p. 166 explained Lord Radcliffe's test as follows:

> To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v. Noblee & Thorl GmbH* [1961] 2 All ER 179 at pg 185,187, [1962] AC 93 at pp 116,119, per Viscount Simonds and per Lord Reid.

[13] Applying the foregoing test, we are of the view that the defence of frustration is not available to the appellant. The 1997 financial crisis merely made it more onerous or perhaps more expensive for the appellant to perform its obligations. It did not render the contract radically different. There is a further reason why the plea of frustration should fail. Under reg. 11(3) of the Regulations it was open for the appellant to make representations to the Controller of Housing – to quote from the Regulation – "owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary". In our judgment reg. 11(3) clearly excludes the operation of the doctrine of frustration in respect of contracts regulated by the Act.

[14] The third ground raised by the appellant is that the respondents are under a duty to prove the damages, if any that they have suffered. This they have not done and their claims should therefore be disallowed. A short answer to this submission is to be found in cl. 22(2) itself. The damages are liquidated and calculated in accordance with the formula prescribed by the clause. No further onus lies upon the respondents in the appeals before us.

[15] The final point made by the appellant relates to the issue of liquidated and ascertained damages. It was submitted that by reason of s. 47 of the Contracts Act 1950 the appellant need only perform its obligations within a reasonable time. Section 47 reads:

A Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

B **[16]** In our judgment this part of the case is inextricably intertwined with the s. 56 argument which has already been dealt with earlier in this judgment. The answer once again lies in cl. 22(2) of the statutory contract. Once the date for delivery of vacant possession passed, the appellant's liability to pay liquidated damages calculated in accordance with the formula provided C became immediate. No question of time being at large therefore arises. Accordingly, s. 47 of the Contracts Act 1950 has no application to the present case.

[17] We now turn to the cross appeals. In four of the appeals D before us the High Court refused to award the respondents liquidated damages for the period until they obtained actual vacant possession of their respective apartments. The factual position is this. The appellant gave each respondent concerned notice that vacant possession was available. Each notice was accompanied by E a statement of the balance sum due from each respondent to the appellant. However there was at the material time liquidated damages owing from the appellant to the relevant respondents. These damages exceeded, in each case, the sum owing from the respondents to the appellant. The respondents were entitled to a F set off the sums owing to them against the sums owing by them. See, *S.E.A Housing Corp. Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305. Accordingly, in our judgment, the notices relied upon by the appellant were clearly invalid because delivery of vacant possession in each case was predicated upon G the payment of a sum not due. The relevant respondents were therefore entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments. There is therefore merit in the cross appeals.

H **[18]** For the reasons already given all the appeals are dismissed. The four cross appeals are allowed. The appellant must pay the respondents the costs of the appeals and the cross appeals. Since only one argument was addressed in response to the appeal, we direct the taxing registrar to allow only one item of getting up to I be awarded to the respondent in Civil Appeal No. W-02-704-

2002. The deposit in each appeal shall be paid out to each respective respondent. Save to the extent of the cross appeals that have been allowed, all orders made by the High Court are affirmed.